

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DISH NETWORK L.L.C. f/k/a ECHOSTAR
SATELLITE L.L.C.,

Plaintiff,

-v-

ESPN, INC., and ESPN CLASSIC, INC.,

Defendants.

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: Hon. John G. Koeltl
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: No. 09 CIV 6875 (JGK) (FM)
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**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR
LEAVE TO AMEND THE JOINT PRE-TRIAL ORDER**

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DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. (“DISH” or “Plaintiff”) respectfully submits this Reply Memorandum of Law in Support of Plaintiff’s Motion for Leave to Amend the Joint Pre-Trial Order (“Motion”) to include an expert witness, Judith Meyka, on the Plaintiff’s “may call” witness list.

ARGUMENT

As DISH represented in its Motion for Leave to Amend the Joint Pre-Trial Order (“PTO”) and informed ESPN on January 2, 2013, DISH admits to inadvertently omitting Judith Meyka from the witness list in the PTO—a representation made by DISH’s counsel as officers of the court. In keeping with ESPN’s pattern of refusing to engage in any sort of reasonable discussions with DISH, ESPN refused to consent to this modest amendment to the PTO. DISH erred by neglecting to include Ms. Meyka on the witness list in the PTO. But it is a sad state of affairs when prominent litigants represented by prominent counsel forego professional courtesy to either obstruct or play “gotcha.”

In any event, ESPN would not be prejudiced by Ms. Meyka’s inclusion on the witness list. ESPN contends that Ms. Meyka’s testimony is improper. That, however, is an argument that goes to the substance of the proper scope of testimony at trial, not an argument regarding whether DISH should be granted leave to correct its inadvertent omission which is the subject of the present motion. ESPN is free to make any argument to the Court regarding the scope of testimony that it deems proper in a motion to limit or exclude Ms. Meyka’s testimony. ESPN admits that it already began drafting such a motion at the time it filed its other motions *in limine*; that it may file the motion now, as opposed to earlier, in no way prejudices ESPN. It is *DISH* that will have to adjust its case if Ms. Meyka’s testimony is ultimately excluded solely due to its error in overlooking Ms. Meyka in connection with the Pre-Trial Order process.

ESPN's contention that its trial strategy will in some way be disrupted by the inclusion of Ms. Meyka's testimony is in conflict with ESPN's labeling of Ms. Meyka's report as "*ipse dixit*." As ESPN itself has emphasized, Ms. Meyka's report succinctly opines on ESPN's obligations to DISH and on whether ESPN satisfied these obligations. Undoubtedly, ESPN has long been preparing a response to these claims.

ESPN also contends that Ms. Meyka's testimony will nullify the parties' agreement that expert witnesses will not testify on the ultimate issues of liability. This is not the case. Ms. Meyka's report—like the report of ESPN's industry expert, J. Gregory Sidak—focuses on the extent of ESPN's obligations to DISH and whether what ESPN did is in conformity with such obligations under industry custom and practice.

CONCLUSION

For the foregoing reasons, Plaintiff DISH respectfully requests that the Court grant DISH leave to add Judith Meyka to the witness list in the Joint PTO.

Dated: January 8, 2013
New York, New York

SIMPSON THACHER & BARTLETT LLP

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